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CHONG JOO TIAN & ORS v. HOW CHEE HONG

COURT OF APPEAL, PUTRAJAYA
HAS ZANAH MEHAT JCA
LEE HENG CHEONG JCA
CHE MOHD RUZIMA GHAZALI JCA
B [APPEAL NO: W-02(A)-583-03-2019]
19 JANUARY 2023

Abstract – *As the nature of the documents sought to be produced in the proceedings does not contain legal advice rendered by the solicitor to his client, there is thus no solicitor and client privilege attached to it. However, taking into consideration that the documents are considered pertinent and crucial, and could be documents generated in furtherance of alleged fraudulent/illegal purposes, they fall squarely within the exception to the principle of solicitor and client privilege. The Disciplinary Committee's order to produce the documents is made well within the powers granted to it pursuant to s. 103B of the Legal Profession Act 1976.*

LEGAL PROFESSION: *Privilege – Solicitor and client – Disciplinary Committee ordered production of documents requested by complainant during hearing of disciplinary proceedings – Whether required solicitor to breach solicitor and client privilege – Whether contrary to ss. 126 to 129 of Evidence Act 1950 – Nature of documents – Whether pertinent and crucial – Whether documents contained legal advice rendered by solicitor to client – Whether there was solicitor and client privilege attached to documents – Whether order to produce documents well within powers of DC pursuant to s. 103B of Legal Profession Act 1976*

CIVIL PROCEDURE: *Documents – Production of – Disciplinary Committee ordered production of documents requested by complainant during hearing of disciplinary proceedings – Whether required solicitor to breach solicitor and client privilege – Whether contrary to ss. 126 to 129 of Evidence Act 1950 – Nature of documents – Whether pertinent and crucial – Whether documents contained legal advice rendered by solicitor to client – Whether there was solicitor and client privilege attached to documents – Whether order to produce documents well within powers of DC pursuant to s. 103B of Legal Profession Act 1976*

The complainant lodged a complaint to the Advocates and Solicitors Disciplinary Board ('ASDB') against the respondent ('plaintiff') for making false representations to his company, Newlake Development Sdn Bhd ('Newlake'), and induced the complainant to enter into an agreement with Zenith Delight Sdn Bhd ('Zenith Delight') to purchase a piece of land for the sum of RM9,056,124 ('payment') which was subsequently found to be a sham transaction. The said sum or payment was paid by Newlake to the plaintiff's legal firm, where the plaintiff was an advocate and solicitor and

the managing partner of the legal firm. Zenith Delight was the client of the plaintiff's legal firm. The ASDB then established a Disciplinary Committee ('DC') to investigate the complaint lodged by the complainant against the plaintiff. The complainant made an application to the DC for cheques, payment vouchers, bank statements, letters and other documents of the plaintiff and/or his legal firm in regards to the payment, to be produced for the DC's inspection. The DC ordered the plaintiff to produce the said documents, requested by the complainant during the hearing of the disciplinary proceedings against the plaintiff. The DC fixed the hearing of the disciplinary proceedings and directed the plaintiff to deliver the said documents to the appellants ('defendants') and the complainant's solicitor before the hearing date. The plaintiff filed an originating summons in the High Court, seeking, *inter alia*: (i) a declaration that the defendants' direction to the plaintiff to comply with the directions would require the plaintiff to breach solicitor and client privilege and was contrary to ss. 126 to 129 of the Evidence Act 1950 ('EA') and/or the common law of solicitor and client privilege; and (ii) a declaration that the documents ordered to be produced by the defendants were documents which were covered by solicitor and client privilege. The defendants had raised preliminary issues (i) on the mode of application by the plaintiff, where the defendant contended that the plaintiff should have brought this action by way of judicial review application instead of originating summons; and (ii) the plaintiff's failure to exhaust the appeal remedy provided under s. 103EA(1) of the Legal Profession Act 1976 ('LPA'). The High Court, in allowing the plaintiff's originating summons, found that (i) the originating summons was the proper mode; (ii) as there was lack of jurisdiction on the part of the DC, there was thus no necessity to exhaust the internal remedy procedure; and (iii) that failure by the defendants to file any affidavit in reply in the present case resulted with the failure to rebut any averments of facts by the plaintiff. Hence, the defendant appealed.

Held (allowing appeal)
Per Lee Heng Cheong JCA delivering the judgment of the court:

(1) The plaintiff's application was related to the plaintiff's solicitor and client privilege embodied in s. 126(1) of the EA. The plaintiff sought a declaration that the order to produce the said documents by the DC in respect of the plaintiff's disciplinary proceedings was in breach of the said plaintiff's solicitor and client privilege. Here, the nature of the decision made by the DC infringed on the plaintiff's private rights. There is no public law element which warranted the commencement of the plaintiff's action herein by way of a judicial review application. Consequently, the originating summons filed by the plaintiff was the proper and correct mode and the issue of abuse of process did not arise. (paras 9 & 10)

(2) The DC had exercised its discretion within the limits of its power under s. 103B of the LPA. There was no lack of jurisdiction. The High Court Judge ('HCJ') erred in dismissing the preliminary objection of the defendant, in that, there was no lack of jurisdiction on the part of the DC. In the premises, the plaintiff should have exhausted his remedy under s. 103EA(1) of the LPA first before commencing any action in court. The plaintiff had failed to exhaust all his remedies before coming to court. Thus, this preliminary objection of the defendants was upheld. (paras 14, 15 & 28)

(3) Nothing in s. 126 of the EA shall protect from disclosure if any such communication made in furtherance of any illegal purpose or any fact observed by any advocate in the course of his employment as such showing that any crime or fraud had been committed since the commencement of his employment. The complainant's said complaint was grounded on, *inter alia*, fraud and misrepresentation on the part of the plaintiff and that the plaintiff was allegedly in fact, in control of the Zenith Delight *ie*, the plaintiff's purported client through his employees in his law firm. In this regard, the complainant contended that the entire transaction or the SPA was a fictitious scheme hatched by the plaintiff to siphon the payment from Newlake for the plaintiff's own gain. Thus, the cheques and documents relating to the pertinent transaction showing whether the payment was indeed paid over by the plaintiff to his client, Zenith Delight, was pertinent and crucial. The documents would only show payment of money, in particular, the payment paid and such cheques and documents would not contain legal advice rendered by the plaintiff to his client so as to render the documents to be subjected to solicitor and client privilege. (paras 18-23)

(4) In light of the complainant's complaints and the nature of the documents sought, there was no solicitor and client privilege attached to the documents ordered to be produced as the documents sought were not professional communication protected by privilege and the exception under s. 126(1)(a) of the EA applied. Therefore, as these cheques and documents could be documents made generated in furtherance of alleged fraudulent/illegal purposes, they fell squarely within the exception to the principle of solicitor and client privilege and could be ordered to be produced. Thus, the DC's decision was upheld and the principle of lack of jurisdiction did not apply here. The order to produce the documents was made well within the powers of the DC granted pursuant to s. 103B of the LPA. (paras 24-27)

(5) Even though the defendants did not affirm any affidavit, they did file a notice of intention to use affidavit filed by the complainant in the form of the complainant's affidavit in reply as their affidavit in this originating summons proceedings to reply and oppose to the plaintiff's claim. Thus,

the HCJ erred in fact and in law in holding that the defendants did not have any affidavit in reply in the High Court proceedings. The HCJ had committed errors which warranted appellate intervention. (paras 31 & 33)

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Government Of Malaysia & Anor v. Jagdish Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 126(1)(a), 127, 128, 129
Legal Profession Act 1976, s. 103B, 103EA(1)
Rules of Court 2012, O. 24, O. 53

For the appellants - Ragunath Kesavan, Natra Adibah Nubli & Joshua Tan; M/s Kesavan
For the respondents - Ravindran Nekoo & N Nathan S Narayanasamy; M/s Kumar Jaspal Quah & Aishah

[Editor's note: For the High Court judgment, please see How Chee Hong v. Chong Joo Tian & Ors [2019] 9 CLJ 383 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Lee Heng Cheong JCA:

Background

[1] The pertinent facts of the present appeal are as follows:

(i) on 30 April 2015, Dato Azizi bin Yorn Ahmad ("the complainant") lodged a complaint to the Advocates & Solicitors Disciplinary Board ("ASDB") against the respondent/plaintiff for making false representation to his company, Newlake Development Sdn Bhd ("Newlake") and induced the complainant to enter into an agreement with Zenith Delight Sdn Bhd ("Zenith Delight"), to purchase a piece of land for the sum of RM9,056,124 ("payment") which was subsequently found to be a sham transaction;

(ii) the said sum of RM9,056,124 or payment was paid by Newlake to the respondent/plaintiff's legal firm, namely Messrs. Kumar Jaspal Quah & Aishah, where the respondent/plaintiff was an advocate and solicitor and the managing partner of the legal firm. Zenith Delight is the client of the respondent/plaintiff's legal firm;

A (iii) the ASDB then established a disciplinary committee ("DC") to investigate the complaint lodged by the complainant against the respondent/plaintiff;

(iv) on 20 April 2017, the complainant made an application to the DC for cheques, payment vouchers, bank statements, letter and other
B documents of the respondent/plaintiff and/or his legal firm in regards to the payment, to be produced for the DC's inspection;

(v) on 2 June 2017, the DC ordered the respondent/plaintiff to produce the said documents requested by the complainant during the hearing of the disciplinary proceedings against the respondent/plaintiff;
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(vi) the respondent/plaintiff then, on 21 June 2017, filed a judicial review application which was later withdrawn by the respondent/plaintiff; and

(vii) then, the DC, by letter dated 28 August 2017, fixed the hearing of the disciplinary proceedings on 24 December 2017 and directed the
D respondent/plaintiff to deliver the said documents to the appellants/defendants and the complainant's solicitor, 14 days before the hearing date.

[2] On 6 September 2017, the respondent/plaintiff filed an originating summons in the High Court, seeking for *inter alia*, the following reliefs:
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(i) a declaration that the appellants'/defendants' direction *vide* their letter dated 25 July 2017 to the respondent/plaintiff to comply with the directions given on 2 June 2017, would require the respondent/plaintiff to breach solicitor and client and is contrary to ss. 126 to 129 of the
F Evidence Act 1950 and/or the common law of solicitor and client privilege;

(ii) a declaration that the appellants'/defendants' statement in the letter dated 25 July 2017 in para. 40 therein that the respondent/plaintiff had not raised the issue of client and solicitor privilege is misguided and
G incorrect as the respondent/plaintiff had stated that the documents were confidential but was denied an opportunity to orally submit on the same as requested;

(iii) that notwithstanding the above, a declaration that the documents ordered to be produced by the appellants/defendants *vide* order dated
H 2 June 2017 and the order dated 25 July 2017 are documents which are covered by solicitor and client privilege; and

(iv) that, in the event the High Court holds that the documents required to be produced pursuant to the orders dated 2 June 2017 and 25 July 2017 are confidential documents covered under solicitor and client privilege
I that the respondent/plaintiff need not produce the same in the proceedings before the appellants/defendants.

[3] The learned High Court Judge allowed the plaintiff's originating summons.

[4] Parties shall be referred to, in their respective capacities before the High Court.

Findings Of The High Court

[5] The learned High Court Judge ("the learned High Court Judge") found *inter alia* as follows:

(i) that in respect of the preliminary issues raised by the defendants namely (i) on the mode of application by the plaintiff in the present case where the defendants' contended that the plaintiff should have brought this action by way of judicial review application instead of originating summons. The learned High Court judge *inter alia*, found that even though a matter which involves an infringement of private law rights, an action can be brought by way of originating summons but if it involves substantial public law element, the correct mode is by way of judicial review application under O. 53 of the Rules of Court 2012. In the present case, the plaintiff's application relates to a breach of the plaintiff's solicitor and client privilege pursuant to sub-s. 126(1) of the Evidence Act 1950, arising from the DC's order to produce various documents for the plaintiff's disciplinary proceedings;

(ii) As regards the other preliminary issue raised by the defendants pertaining to the plaintiff's failure to exhaust the appeal remedy provided under sub-s. 103 EA(1) of the LPA 1976. The learned High Court Judge found that even though the principle of law is that reliefs should not be granted if there exist an alternative remedy. However, there is an exception to this principle where there exist a special circumstances or exceptional cases as laid down in the Supreme Court in the case of *Government Of Malaysia & Anor v. Jagdish Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110; and

(iii) The learned High Court Judge agreed with the submission by the plaintiff's counsel that failure by the defendants to file any affidavit-in-reply in the present case resulted with the failure to rebut any averments of facts by the plaintiff. (see *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ 609).

Our Decision

[6] On the preliminary objection regarding whether the plaintiff's originating summons is an abuse of process, we find as follows. The learned High Court Judge here held that as this matter concerns the private rights of the plaintiff and the plaintiff was correct in commencing his action by way of the originating summons.

[7] Disputes involving infringement of private law rights can be brought by way of originating summons but if it involves substantial public law element, the proper and correct mode is by way of judicial review application under O. 53 of the Rules of Court 2012. Such determination involves appreciation of the facts of each particular case.

[8] The Federal Court case of *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2010] 3 MLJ 145, is instructive and pertinent and the Federal Court in this case held as follows:

> [61] We observed that *a challenge on the use of appropriate procedure is very much fact based.* Thus, *it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by law of O. 53 of the RHB.* If it is a mixture of public law then the court must ascertain which of the two of the two is more predominant. If *it has substantial public law element then the procedure under O. 53 of the RHC must be adopted.* Otherwise it may be set aside on ground that it abuses the court's process. But *if the matter is under private law though concerning a public authority, the mode to commence such action under O. 53 of the RHC is not suitable.* Aside from this, there could be other circumstances like the kind in YAB Dato' Dr. Zambry. Much depends on the facts of the case. But generally the court should be circumspect in allowing a matter which should be by way of O. 53 of the RHC to proceed in another form. To say that it is opened to any applicant seeking judicial review to elect any mode he prefers, as implied in Kuching Waterfront, would, in our considered opinion, be rendering O. 53 of the RHC redundant. This is certainly not the intention of the drafters of this rule who had a purpose in mind. When the purpose of this rule is in the interest of good administration then this rule must be adhered to except in the limited and exceptional circumstances discussed. (emphasis added)

[9] In the present case, the plaintiff's application relates to the plaintiff's solicitor and client privilege embodied in sub-s. 126(1) of the Evidence Act 1950. The plaintiff sought a declaration that the order to produce the said documents by DC in respect of the plaintiff's disciplinary proceedings is in breach of the said plaintiff's solicitor and client privilege.

[10] Here, the nature of the decision made by DC infringed the plaintiff's private rights. There is no public law element in the present case which warrants the commencement of plaintiff's action herein by way of judicial review application. Consequently, we are of the considered opinion that the originating summons filed by the plaintiff is the proper and correct mode and the issue of abuse of process does not arise.

[11] The other preliminary objection raised by the defendants is that the plaintiff failed to comply with s. 103EA(1) of the Legal Profession Act 1976. Since the Legal Profession Act 1976 provided for an internal remedy to an aggrieved party, then it would be obligatory that recourse must first, be had

to that internal remedy mechanism provided thereunder, before resorting to the court for reliefs. In the present case, we are of the considered view that the internal remedy that has not been exhausted is the one provided for, under s. 103EA of the Legal Profession Act 1976.

[12] In respect of the remedy of a written objection under s. 103EA(1) of the Legal Profession Act 1976, we are of the respectful view that it is not an optional but a mandatory step that must be undertaken by the plaintiff before he can seek reliefs from the court.

[13] We are of the considered view that the learned High Court Judge's finding that the exception to the general principle applies here as this is a case where there is lack of jurisdiction on the part of the DC in making the DC's decision, is erroneous. We shall elaborate further on this point when we deal with the merits of the plaintiff's originating summons.

[14] We are of the considered view that in the present case, the DC exercised its discretion within the limits of its power under s. 103B of the Legal Profession Act 1976. We find that the learned High Court Judge's reasoning of the DC's purported "lack of jurisdiction" is simply because the documents ordered to be produced, fall within the solicitor and client privilege.

[15] Our considered opinion is that the learned High Court Judge erred in dismissing the second preliminary objection of the defendant, in that there was no lack of jurisdiction on the part of the DC and the plaintiff has failed to exhaust all his remedies before coming to court. Thus, we uphold this preliminary objection of the defendants.

[16] For completeness, we shall proceed to consider the merits of the plaintiff's originating summons.

Merits Of The Application

[17] The common law doctrine of solicitor and client privilege has been codified in s. 126 of Evidence Act 1950, which dealt with professional communications. In essence, no advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.

[18] However, nothing in the said s. 126 shall protect from disclosure if, any such communication made in furtherance of any illegal purpose or any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

[19] In the present case, the documents ordered to be produced by the DC are as follows:

> all cheques, payment vouchers, banks statements, letters and other documents which specifically relate to or show the manner of the retention, release, payment and dealing of the aggregate deposit sums of RM9,056,124.00 ("Documents")

[20] It is noted that the complainant's said complaint is grounded on, *inter alia*, fraud and misrepresentation on the part of the plaintiff and that the plaintiff was allegedly in fact, in control of the Zenith Delight *ie*, the plaintiff's purported client through his employees in his law firm, Messrs Kumar Jaspal Quah & Aishah. In this regard, the complainant contended that the entire transaction or the SPA was a fictitious scheme hatched by the plaintiff to siphon the payment from Newlake for the plaintiff's own gain.

[21] The plaintiff's response to the complainant's above allegation was that the payment has been released to Zenith Delight.

[22] Thus, we are of the considered view that cheques and documents relating to the pertinent transaction showing whether the payment was indeed paid over by the plaintiff to his client, Zenith Delight is pertinent and crucial.

[23] The documents would only show payment of money, in particular the payment paid and such cheques and documents would not contain legal advice rendered by the plaintiff to his client so as to render the documents to be subjected to solicitor and client privilege.

[24] In light of the complainant's complaints and of the nature of the documents sought, we are of the considered opinion that there is no solicitor and client privilege attached to the documents, ordered to be produced as the documents sought are not professional communication that is protected by privilege and the exception under s. 126(1)(a) of the Evidence Act 1950 applies.

[25] Therefore, as these cheques and documents could be documents made generated in furtherance of alleged fraudulent/illegal purposes, they fall squarely within the exception to principle of solicitor and client privilege and can be ordered to be produced. In this respect, we respectfully find that the DC did not err.

[26] Thus, there is no error of law or facts in the DC's decision and the documents are not subjected to solicitor and client privilege. The DC's decision is upheld and the principle of lack of jurisdiction does not apply here.

[27] Even if the documents are subjected to solicitor and client privilege, in our considered view, the order to produce the documents is made well within the powers of the DC granted pursuant to s. 103B of the Legal Profession Act 1976 which states as follows:

(2) For the purposes of any inquiry under subsection (1) the Disciplinary Committee may:

(a) require the production for inspection by the Disciplinary Committee of any book, document or paper which may relate to or be connected with the subject matter of the inquiry and may require any person to give information in relation to such book, document or paper

[28] As stated earlier, the learned High Court Judge held that as there was lack of jurisdiction on the part of the DC, there was thus no necessity to exhaust the internal remedy procedure. In our considered view, there is no lack of jurisdiction and the exception under the case of *Government Of Malaysia v. Jagdish Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 does not apply. In the premises, the plaintiff should have exhausted his remedy under s. 103EA(1) of the Legal Profession Act 1976 first before commencing any action in court.

[29] We are of the considered view that a wrong exercise of discretion of the court or DC is not the same as lack of jurisdiction. A court or the DC in this case possess jurisdiction, to order production of documents under O. 24 of the Rules of Court 2012 but wrongly exercised its discretion, in ordering the production of documents that are subjected to privilege. In such a case, the court or DC may have erred but there is clearly no issue of lack of jurisdiction on the part of the court or DC.

[30] Thus, we are of the considered view that the learned High Court Judge had failed to appreciate the nature of the documents ordered to be produced and erred in holding that the documents are subjected to solicitor and client privilege when they are not.

[31] On the issue relating to the learned High Court Judge's finding that the defendants' failure to file any affidavit-in-reply in the present case resulted with the failure to rebut ant averments of facts by the plaintiff, we are of the considered opinion that this finding of the learned High Court Judge is erroneous as even though the defendants did not affirm any affidavit, they did file a notice of intention to use affidavit filed by the complainant's in the form of the complainant's affidavit in reply as their affidavit in this originating summons proceedings to reply and oppose to the plaintiff's claim. Thus, the learned High Court Judge had erred in fact and in law in holding that the appellants did not have any affidavit in reply in the High Court proceedings.

Our Conclusion

[32] In reaching our conclusion, we were very much guided by the principles on appellate intervention as recently pronounced by the Federal Court in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1. In our view, the learned High Court Judge's various findings mentioned above, were in our view, plainly wrong.

A **[33]** We are of the considered opinion that the learned High Court Judge committed errors which warranted appellate intervention in the defendants' appeal. More often than not, an appellate court will not reverse a trial court's findings of facts unless that finding was 'plainly wrong'.

B **[34]** In light of our above findings, we are of the respectful view that there are merits in the defendants' appeal and we unanimously allow the defendants' appeal with no order as to costs.

[35] The decision of the learned High Court Judge of 22 February 2019 is set aside.

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